FILE COPY

No. 1062



IN THE

# Supreme Court of the United States

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W. F. WILSON, *Petitioner*

v.

RECONSTRUCTION FINANCE CORPORATION, *Respondent*

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## MOTION AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ROBERT M. LITTLE.

YOUNG CO., HOUSTON

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## ALPHABETICAL LIST OF AUTHORITIES

No._____

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COMES NOW W. F. Wilson ~~by Robert M. Lyles, his counsel~~ Pro Se, and moves this Honorable Court that it shall by certiorari or other proper process directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Circuit, require said Court to certify to this Court for review and determination a certain cause in said Circuit Court of Appeals lately pending wherein the Petitioner, W. F. Wilson, was Appellant and the Respondent, Reconstruction Finance Corporation, was Appellee, and to

that end he now tenders herewith his petition with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

Respectfully submitted,

W. F. Wilson

*Petitioner Pro Se*

# PETITION FOR A WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE UNITED STATES TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT TO THE SUPREME COURT OF THE UNITED STATES

W. F. WILSON, *Petitioner*

v.

RECONSTRUCTION FINANCE CORPORATION, *Respondent*

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*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

YOUR PETITIONER W. F. Wilson, acting herein for himself and for the others similarly situated and on whose behalf he brought this suit, Respectfully Represents:

This suit was filed in the District Court of the United States for the Southern District of Texas by W. F. Wilson on his own behalf and numerous others similarly situated against Defense Plant Corporation for overtime payment, liquidated damages and attorneys fees under the *Fair Labor Standards Act,* 29 U.S.C.A. Section 203. After the passage of *Legislation Public Law* 109 of the 79th Congress, transferring all assets and imposing all liabilities of Defense Plant Corporation to and upon Reconstruction Finance Corporation, the last named corporation was substituted party defendant.

The Court below in dismissing the suit held that the Appellants were not engaged in commerce. The correctness of this ruling was the sole issue presented by the appeal. (Pp. ..... of opinion of Circuit Court of Appeals)

Appeal was duly perfected to the Circuit Court of Appeals of the United States for the Fifth Circuit and the judgment of the lower court was affirmed by the Circuit Court of Appeals on the 17th day of December, A. D. 1946. Shortly thereafter motion for rehearing was filed which was denied by the Circuit Court of Appeals on the 13th day of January, A. D. 1947.

**Statement of the Facts Necessary to an Understanding of the Issues Involved**

Defense Plant Corporation was organized for the purpose, among other things, to engage throughout the nation in the manufacture of strategic and critical materials, to build and expand plants and to purchase and produce equipment, facilities, machinery and supplies for the manufacture of strategic and critical materials or any other article and equipment as may be required in the manufacture or use of any of the foregoing or otherwise necessary in connection therewith.

Pursuant to this purpose Defense Plant Corporation constructed a large plant in Brazoria county, Texas, for the manufacture of magnesium at a cost of Fifty Two Million Dollars and leased it to Dow Magnesium Corporation for One Dollar per year

and the further consideration that Dow Chemical Corporation would manufacture Magnesium for Defense Plant Corporation for a Fee of 2½c per lb.

About the same time it constructed another plant on adjoining land for the manufacture of Styrene at a cost of Twenty Seven Million Dollars, and leased this plant to Dow Chemical Company with the understanding that Dow Chemical Company would contract the Styrene produced to Defense Rubber Corporation.

At this point attention is called to the fact that the opinion of the Circuit Court of Appeals states that these plants were built by Dow Magnesium and Dow Chemical Company, respectively. It is here respectfully pointed out that this statement does violence to the record. It was admitted by the Defendant that both of these plants were built by Defense Plant Corporation. (Record 21.) The Circuit Court of Appeals ignored Petitioner's request to amend this finding to conform to the record, which request was included in his motion for rehearing.

Simultaneously with the construction of these plants, Defense Plant Corporation constructed a housing program on adjacent land known as Camp Chemical, Plancor 505. It constructed thereon Two Thousand Eight Hundred and Fifty (2850) Houses and Forty-six (46) Barracks. There were no other housing facilities available to the workmen employed at these plants. (Record 14.) Consequently this housing project was necessary and indispensable to the production of Magnesium and Styrene.

Defendant admitted that the products of these plants moved in interstate commerce. (Record 21.)

It was undisputed and found by the trial court that the employees on whose behalf this suit was brought worked many hours in excess of the forty hours per week and received no overtime compensation.

Petitioner now quotes from the findings of the Circuit Court of Appeals:

> "When the plants were in production employees in the plants were the main occupants of the houses.
>
> "Plaintiffs were in the sole employment of Defense Plant Corporation. They were firemen on the four hundred acre tract, guards of the lives and property thereon and operators of the plant furnishing water service to the tract (housing project)."

The Court held:

> "Because their services benefited persons engaged in commerce and the production of goods for commerce, they claimed that they were engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act. This claim is based on the theory that their close and intimate tie to the production of goods for commerce and the essentiality of their services to such production made them a part of the general plan governing the production of goods for commerce. We do not agree."
>
> "Plaintiffs were not engaged in the production of goods for commerce. Plaintiffs were the employees of the Defense Plant Corporation. Most of the housing occupants served by Plaintiffs were employed at the two chemical plants

> and were employees of the Independent Contractor and of the Lessee of the Defense Plant Corporation. The independence of the employer of the Plaintiffs and the employer of the housing occupants insulates Plaintiffs from the status of producers of goods for commerce."

In this respect, Petitioner respectfully submits that the Circuit Court of Appeals erred, for the reason that the record clearly shows that the primary purpose of Defense Plant Corporation was to bring into being and make available Magnesium and Styrene, all of which moved in commerce. With this end in view it constructed two vast and expensive plants and contracted with Dow Magnesium Corporation and Dow Chemical Company to manufacture such goods.

This necessarily required a large number of workmen. The record is undisputed that there were no housing facilities for these workmen available; it follows that housing facilities were indispensable. Without them the workmen could not live in such proximity of the plants as to be able to work there. Defense Plant Corporation provided these housing facilities. They were necessary and indispensable for the production of goods for commerce. This housing project was, therefore, but an integral part of the coordinated industrial pattern evolved and put into operation by Defense Plant Corporation for the production of goods for commerce.

It follows that since the housing project was essential to the production of such goods for commerce, the protection of such project from fire, theft and

violence and furnishing water to its occupants was an indispensable part of its maintenance.

The holding of the Circuit Court of Appeals, that:

> "The independence of the employer of Plaintiffs and the employers of the housing occupants insulates Plaintiffs from the status of producers of goods for commerce."

strikes the petitioner as being in direct conflict with the opinion of the Supreme Court of the United States in the case of *Kirschbaum v. Walling,* 316 U. S. 517.

In the *Kirschbaum* case the employers of the watchmen, carpenters, janitors, etc., were concerned only with operating and renting the spaces in a loft building. They were absolutely independent of the people who manufactured the goods for commerce. However, the services of these employes were held to be necessary or essential to the manufacture of goods for commerce, and in that case the Supreme Court did not hold that the independence of their employers and those engaged in the manufacture of goods insulated the employees in the loft building from the status of producers of goods for commerce.

In the instant case Defense Plant Corporation was concerned with the production of the goods for commerce and was having them produced.

The Opinion of the Circuit Court of Appeals in the instant case seems also to be in conflict with the opinion of the Circuit Court of Appeals for the Third Circuit in the case of *Walling v. McRady Construction Company,* 15 Fed.2d 932.

In the *McRady* case the workmen were employed by contractors constructing new and repairing old facilities of railways, highways, sewage systems, dams and telephone installations and a signal tower. The contractors for whom they worked were independent contractors and had no connection with the transportation business but their services were held to be essential to commerce and it was not held that the independence of their employer from those engaged in commerce insulated them from the status of producers of goods for commerce.

The case of *Consolidated Timber Company v. Womack,* 132 Fed.2d 101, by the Circuit Court of Appeals for the Ninth Circuit, clearly shows that the character of work performed by Plaintiff and those on whose behalf he brought this suit is within the coverage of the act. If indeed any authority is necessary to demonstrate this.

Petitioner paraphrases the language of Mr. Justice Frankfurter of this Court in the case of 10th *East* 40th *Street Building Inc. v. Callus,* 319 U. S. 492:

> "To differentiate in the incidence of the Fair Labor Standards Act between employees who maintained housing facilities for the workmen actually producing such goods is to make too much turn on the accident of division of the whole industrial process."

WHEREFORE your Petitioner respectfully prays that a Writ of Certiorari may be issued out of and under seal of this court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, com-

manding said court to certify and send to this court, on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings and the said case therein entitled W. F. WILSON ET AL., *Appellant* v. RECONSTRUCTION FINANCE CORPORATION, *Appellee,* No. 11,767, to the end that said case may be reviewed and determined by this court as provided by law, and that your Petitioner may have such other and further relief or remedy as to the court may seem appropriate and in conformity with law, and that said judgment of said Circuit Court of Appeals in said case and every part thereof may be reversed by this Honorable Court, and as in duty bound he will ever pray.

W. F. Wilson

*Petitioner Pro Se*

The State of Texas
County of Brazoria

ROBERT M. LYLES, being duly sworn, says that he is one of the counsel for the petitioner, that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

Robert M. Lyles

ROBERT M. LYLES.

SUBSCRIBED and Sworn to before me this 19th day of February, A. D. 1947.

Jinah Lee Smith
(Jinah Lee Smith)
*Notary Public in and for*
*Brazoria County, Texas*

**Date Fixed for Submission**

The date fixed for submission of the foregoing motion and Petition for Writ of Certiorari is Monday, March ~~3rd~~ 10th, A. D. 1947.

W. F. Wilson

*Petitioner Pro Se*

**Acknowledgment of Service**

Service of the date fixed for submission of the foregoing motion and Petition for a Writ of Certiorari, together with a copy of the foregoing motion and Petition for a Writ of Certiorari is hereby acknowledged.

This ..... day of February, A. D. 1947.

ROBERT F. CAMPBELL
RAYMOND A. COOK
ANDREWS, KURTH, CAMPBELL
& BRADLEY

By .....
*Attorneys for Respondent*

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## CITATIONS





738577—47

# In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1062

W. F. WILSON, PETITIONER

*v.*

RECONSTRUCTION FINANCE CORPORATION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE RECONSTRUCTION FINANCE CORPORATION IN OPPOSITION

### OPINIONS BELOW

The opinion of the District Court, in the form of Findings of Fact and Conclusions of Law (R. 20–27), is not officially reported. The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 162–164) is reported in 158 F. 2d 564.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 17, 1946 (R. 165). Petition for rehearing (R. 166) was denied by the Circuit Court of Appeals on January 13, 1947 (R. 170). The petition for a writ of certiorari was filed on February 26, 1947. The jurisdiction of

this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether persons employed as watchmen, guards, firemen and maintenance men on a Federally owned housing project, the occupants of which are employed in the construction and operation of nearby manufacturing plants, are engaged in commerce or in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938 (29 U. S. C. Secs. 201–219).

## STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060) are as follows:

SEC. 3. [29 U. S. C. 203].

* * * * *

As used in this Act—

> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee, but shall not include the United States * * *
>
> * * * * *
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing,

mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

* * * * *

SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

This is a suit for overtime pay, liquidated damages and attorney's fees under the Fair Labor Standards Act. The Dow Magnesium Corporation, as an independent contractor of Defense Plant Corporation (hereinafter referred to as DPC), built and operated a plant for the production of magnesium, in accordance with an agreement be-

tween DPC and Dow Magnesium Corporation, dated October 4, 1941 (R. 38, 163). The Dow Chemical Company, as Lessee of DPC, built and operated a plant for the production of styrene, in accordance with an agreement between DPC and Dow Chemical Company, dated May 1, 1942 (R. 22, 38, 163). Both plants were owned by DPC, and were located in Brazoria County, Texas. All the magnesium produced and the greater part of the styrene produced in these plants were shipped in interstate commerce. (R. 21.) Near the location of the two plants DPC acquired approximately 400 acres of land, and constructed thereon approximately 2,000 houses for rental primarily to the workers engaged in the construction of the Dow magnesium and styrene plants (R. 23, 40). DPC hired a manager to run the housing project (R. 40). There is some evidence that the housing manager was an independent contractor (R. 44), although the courts below found that the manager was not an independent contractor, but an agent of DPC (R. 23, 163).

DPC's rental housing development was entirely separate and independent of the Dow manufacturing plants (R. 78). The management of the development was not subject to control in any way by Dow Magnesium Corporation or Dow Chemical Company (R. 52). The 400 acres of land and the 2,000 dwellings constituted a small town, with graded streets, guards, a fire depart-

ment, water, lights, gas and sewerage. This development was used exclusively for residence, and no production or manufacture of goods of any kind took place thereon. (R. 23, 52.) There was a community center where the people met for religious worship, entertainment and other communal purposes. The development contained a small merchandise store, owned by a nonresident of the development, where goods were sold not only to those who occupied the houses, but to the general public as well. There was a branch post office, and a school attended by approximately 650 children who lived in the development. (R. 23–24, 73, 100–104.)

During the time that the Dow magnesium and styrene plants were being constructed, most, if not all, of the persons who lived in the housing project were employed in constructing the plants, and not in the operation thereof (R. 23, 40, 50, 65). The evidence was not sufficient to support a finding by the District Court as to how many of the persons living in the development, during the period covered by the petitioner's claim, were employed in the operation of the plants (R. 23, 40, 50, 65, 142). A separate housing project was constructed at Lake Jackson to house the persons engaged in the operation of the Dow plants (R. 65, 142).

The plaintiffs were employed by the manager of DPC's rental housing development as firemen,

guards, and operators of the development's water plant. The duties of the firemen were to put out fires, if any, on DPC's housing tract; the duties of the guards were to guard the property of DPC and of the persons living on the housing tract; and the duties of the water plant employees were to aid in the furnishing of water to those who lived on the tract (R. 80, 81, 128). They performed no services either in the plant of Dow Magnesium Corporation or in the plant of Dow Chemical Company (R. 84, 119). They were hired and fired by DPC's housing manager, and their salaries were paid by the manager from funds furnished by DPC (R. 47, 48, 67, 72).

The plaintiffs, eleven in number, brought suit against the Reconstruction Finance Corporation.[1] The District Court decreed judgment for the defendant. The Circuit Court of Appeals affirmed the judgment, holding that the plaintiffs were not engaged in commerce or in the production of goods for commerce within the meaning of the Fair Labor Standards Act, in that their services were too remote from commerce and were not necessary to the production of goods for commerce.

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[1] In the District Court, Reconstruction Finance Corporation was substituted for Defense Plant Corporation (R. 20) since the Act of June 30, 1945, 59 Stat. 310, had dissolved Defense Plant Corporation and transferred all its functions, powers, duties and authority, together with all its assets and liabilities, to Reconstruction Finance Corporation.

## ARGUMENT

**1. The petitioner was not engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act.**

Whether the persons living in the housing development were engaged in the construction or the operation of the Dow magnesium and styrene plants, the services rendered by petitioner to such persons were not necessary to the production of goods for commerce within the meaning of the Act. Here the services were not rendered at a place where any production was taking place. The petitioner merely helped to maintain a housing development which was physically and managerially separated from the plants where production was taking place. The only connection petitioner had with the production of goods for commerce lay in the fact that the residential development where he worked was inhabited by persons engaged elsewhere in the production of goods for commerce. It is submitted that this is too remote from such production to fall within the coverage of the Act. Remoteness of a particular occupation from the physical processes of production is a relevant factor in drawing the line between what is and what is not necessary to production. *10 East 40th Street Building, Inc.*, v. *Callus*, 325 U. S. 578, 583.

To hold the Act applicable to maintenance employees of a housing project would extend its

coverage to every necessary service, however remote from production, rendered at any time or place to a person engaged in the production of goods for commerce. As the opinion below aptly points out, the petitioner's services benefited the housing occupants not when they were producing goods for commerce, but when they were entirely separated from the production of goods for commerce (R. 164).[2] The mere fact that petitioner's services may have been necessary to the persons living in the development is not controlling, for as this Court said in the *Callus* case, *supra,* at 582, "merely because an occupation is indispensable, in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods, does not bring it within the scope of the Fair Labor Standards Act." We are advised that the Administrator of the Wage and Hour Division has never sought to bring employees such as are here involved within the coverage of the Act.

2. Although this respondent contended in the two lower courts that the manager of its housing

[2] Lower courts have held that original construction of a plant is not production of goods for commerce. *Barbe* v. *Cummins Const. Corp.*, 138 F. 2d 667 (C. C. A. 4); *Noonan* v. *Fruco Const. Co.*, 140 F. 2d 633 (C. C. A. 8); *Parham* v. *Austin Co.*, 158 F. 2d 566 (C. C. A. 5); *Scott* v. *Ford, Bacon & Davis, Inc.*, 55 F. Supp. 982 (E. D. Pa.); *Collins* v. *Ford, Bacon & Davis, Inc.*, 66 F. Supp. 424 (E. D. Pa.). But cf. *McCrady Construction Co.* v. *Walling*, 156 F. 2d 932 (C. C. A. 3), certiorari denied, No. 635, November 25, 1946; *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88.

development was an independent contractor, so that the plaintiffs would be his employees and not those of DPC, nevertheless, both lower courts found that the manager was an agent of DPC, and that plaintiffs were employees of DPC. If the plaintiffs were employees of DPC, then DPC (as a Federal instrumentality, wholly owned by the respondent, which in turn is a Federal instrumentality, wholly owned by the United States) would not be liable to them since it is not an employer within the meaning of the Fair Labor Standards Act. (Sec. 3 (d).) On the other hand, if plaintiffs are employees of the manager, as independent contractor, then DPC would not be their employer and also would not be liable. In either event, no cause of action against DPC is stated.

3. The petitioner cites the case of *Consolidated Timber Company* v. *Womack,* 132 F. 2d 101 (C. C. A. 9), as being in conflict with the opinion of the Circuit Court of Appeals in the instant case. The *Womack* case, however, is readily distinguishable. In the *Womack* case the plaintiff was a cook, employed by a logging company in a cookhouse operated by the company for its employees. The noon meal, of course, was served during the work day, while the logging employees were engaged in productive work. The facilities furnished by the cookhouse were an integral part of the logging business. The meals were sold at cost to the employees of the logging company, and were paid for by deductions out of wages. In

the present case, the services of the petitioner were of a different nature from those in the *Womack* case. Feeding men while they are at work is quite different from rendering maintenance services to the housing development where they live. The housing project was a completely separate and independent enterprise, and the services of the petitioner benefited the housing occupants when they were entirely separated from productive work.

## CONCLUSION

The findings and decisions of the two lower courts are correct and fully in accord with the decisions of this Court and of the lower Federal courts. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

GEORGE T. WASHINGTON,
*Acting Solicitor General.*
ROBERT L. STERN,
*Special Assistant to the Attorney General.*
JAMES L. DOUGHERTY,
*General Counsel,*
ARTHUR J. HARVITH,
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APRIL, 1947.

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